Koh Thong Chuan v The Official Assignee of the property of Koh Liang Hee, a bankrupt and another appeal

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NOS W-02-162 OF 1997 & W-02-169 OF 1997
GOPAL SRI RAM, NH CHAN AND HAIDAR JJCA
25 NOVEMBER 2002

Bankruptcy *— Sale and purchase of land — Vendor subsequently adjudged bankrupt — Land charged by purchaser to chargee — Transfer of property to purchaser void for fraudulent conveyance — Chargee acted in good faith and for valuable consideration — Whether chargee entitled to the protection of s 53B(3) of the Bankruptcy Act 1967 — Whether official assignee took land subject to chargee's charges*

Bankruptcy *— Act of bankruptcy — Relation back doctrine — Sale and purchase of land between father and son — Father subsequently adjudged bankrupt — Relation back of official assignee's title to act of bankruptcy — Computation of time for purpose of relation back — Whether time should be computed from date of sale and purchase agreement or date of registration of transfer — Bankruptcy Act 1967 s 47*

Bankruptcy *— Act of bankruptcy — Fraudulent conveyance — Sale and purchase of land between father and son — Father subsequently adjudged bankrupt — Whether fraudulent conveyance — Whether transfer of property was void — Whether property deemed to be official assignee's — Bankruptcy Act 1967 s 53B(1)*

Land Law *— Charge — Indefeasibility of interest — Transfer of land by vendor to purchaser void for fraudulent conveyance — Purchaser charged land to chargee — Chargee bona fide purchaser for value and without notice — Land not yet registered in name of official assignee — Whether official assignee vested only with equitable interest in land — Whether legal interest of chargee prevailed over official assignee's equitable interest — National Land Code 1965 s 349*

Land Law *— Indefeasibility of title and interest — Determination of title by operation of law — Bankruptcy of vendor — Determination of vendor's interest in land pursuant to s 24(4) of the Bankruptcy Act 1967 — Whether divestment of bankrupt's interest in land and vesting of that interest in official assignee may only be effected by endorsement of a memorial of transmission under s 349(1) of the National Land Code 1965 — Whether there was automatic vesting of land in the official assignee*

Pursuant to a sale and purchase agreement executed on 22 September 1990 between one Koh Liang Hee ('KLH') and his son ('the first appellant'), KLH sold a piece of property situated in Jalan Yap Kwan Seng, Kuala Lumpur ('the said property') to the first appellant for a consideration of RM1m. The transfer of the said property to the first appellant was registered on 26 March 1991. On 1 September 1993, the second appellant granted financial facilities to the first appellant, which were to be secured by two separate charges on the said property. Prior to these transactions, judgment had been entered by United Malayan Banking Corporation Bhd ('UMBC') against KLH on

15 December 1989 in the sum of RM5.13m. The bankruptcy petition was presented by UMBC against KLH on 15 August 1991 and KLH was adjudicated a bankrupt on 3 July 1992. The official assignee ('the respondent') succeeded in obtaining a declaratory order from the High Court that the conveyance of the said property from KLH to the first appellant was void under ss 47 and/or 52 of the Bankruptcy Act 1967 ('the Act'). The learned High Court judge found that the first act of bankruptcy committed by KLH was the fraudulent conveyance or transfer of the said property to the first appellant and held that since the transfer of the said property had taken place on 26 March 1991, it was within the six-month period preceding the date of presentation of the bankruptcy petition. The issue against the second appellant was in respect of the charges. The respondent never challenged during the trial that the second appellant had acted bona fide in granting the loans to the first appellant. The respondent succeeded in obtaining declaratory orders from the High Court that the charges created were void against the respondent and that by virtue of ss 47 and 53B(2) of the Act and s 340(4) of the National Land Code 1965 ('the NLC'), the respondent was entitled to recover the said property from the first appellant free from the second appellant's charges. The High Court judge ruled that since the conveyance between KLH and the first appellant was fraudulent and therefore void, the title of the first appellant in the said property had determined. This determination related back to the time of the transfer and as such, the first appellant had no title at any time to the said property and hence, he could not have created the charges in favor of the second appellant. Accordingly, the High Court judge held that the second appellant had no protection of indefeasibility offered under s 340(1) of the NLC. These were the appeals by the first and second appellants.

Held, dismissing the first appellant's appeal and allowing the second appellant's appeal:

(1) In computing the time for the purpose of relation back under s 47 of the Act in respect of the alleged fraudulent transfer of the said property as an act of bankruptcy, the learned High Court judge correctly took the date of the registration of the transfer of the said property, 26 March 1991, rather than the date of the execution of the alleged sale and purchase agreement of 22 September 1990 (see p 122B–C); *Lian Keow Sdn Bhd (in liquidation) v Overseas Credit Finance (M) Sdn Bhd* [1988] 2 MLJ 449 followed.

(2) The learned High Court judge had correctly considered that to constitute fraudulent conveyance in the context of bankruptcy legislation, there need not be more than a design to defeat or delay creditors, generally by some act which would prevent the distribution of the insolvent debtor's property in accordance with the bankruptcy law (see p 122F–H); *Re Khor Bak Kee* [1936] MLJ 5 followed.

(3) After having examined the learned High Court judge's analysis of the evidence, his finding of facts and assessment of the testimony of the relevant witnesses, he was correct in finding that the transfer of the said property from KLH to the first appellant was a fraudulent conveyance constituting an act of bankruptcy within s 3(1)(b) of the Act and was therefore void. Accordingly, it followed that by virtue of s 53B(1) of the Act, the said property was deemed to be the property of the respondent (see p 124D–E).

(4) Until the registration of the said property pursuant to s 349 of the NLC in his name, the respondent was vested only with an equitable interest in the said property. In accordance with equitable principles, the legal interest in the charges acquired by the second appellant, as a bona fide purchaser for value and without notice, prevailed over the respondent's equitable interest (see p 126C–D).

(5) Having accepted that the second appellant had acted in good faith in granting the loans to the first appellant, the learned High Court judge, however, failed to consider the effect of s 53B(3) of the Act. Although the transfer of the said property may be avoided on the ground of fraudulent conveyance, the second appellant was entitled to the protection of s 53B of the Act as it had acted in good faith and for valuable consideration. Section 53B(1) of the Act provided that in the event that the acquisition of the property of the bankrupt was set aside, the property shall be deemed to be the property of the official assignee and the official assignee may recover the property from the person who acquired it from the bankrupt or from any other person to whom the person may have sold, resold or transferred the property. However, s 53(B)(3) of the Act provided exception to s 53(B)(1) and (2) if the subsequent acquirer gave valuable consideration and acted in good faith, in which case the recourse would be only as against the person who entered into the transaction with the bankrupt, namely the first appellant. Accordingly, the respondent would have to take the said property subject to the second appellant's charges (see pp 125D–F, 128D–G).

(6) The learned High Court judge had erred in applying s 340(4)(b) of the NLC as having determined KLH's title from the time of the alleged fraudulent conveyance, that is, 26 March 1991. Section 340(4)(b) of the NLC was a savings provision and cannot operate by itself to determine any title or interests in land. In the instant case, the determination of KLH's interest in land can arise either pursuant to s 24(4) of the Act at the time of the adjudication of his bankruptcy or upon the avoidance of the fraudulent conveyance. Pursuant to s 349 of the NLC, the divesting of KLH's interest in the land and the vesting of that interest in the respondent, in either of the above events, may only be effected by the endorsement of a memorial of transmission under s 349(1)

thereof. There was no automatic vesting in so far as land was concerned (see pp 127E–128A).

[Bahasa Malaysia summary

Menurut satu perjanjian jual beli yang telah disempurnakan pada 22 September 1990 antara seorang bernama Koh Liang Hee ('KLH') dan anak lelakinya ('perayu pertama'), KLH menjual hartanah yang terletak di Jalan Yap Kwan Seng, Kuala Lumpur ('hartanah tersebut') kepada perayu pertama untuk balasan sebanyak RM1j. Pindahmilik hartanah tersebut kepada perayu pertama didaftarkan pada 26 Mac 1991. Pada 1 September 1993, perayu kedua memberikan kemudahan kewangan kepada perayu pertama, yang harus dijamin dengan dua cagaran berasingan ke atas hartanah tersebut. Sebelum kesemua transaksi ini berlaku, penghakiman telah dimasukkan oleh United Malayan Banking Corporation Bhd ('UMBC') terhadap KLH pada 15 Disember 1989 bagi jumlah RM5.13j. Petisyen kebankrapan dikemukakan oleh UMBC terhadap KLH pada 15 Ogos 1991 dan KLH dihakimkan sebagai seorang muflis pada 3 Julai 1992. Pegawai penerima harta ('responden') telah berjaya memperolehi satu perintah perisytiharan daripada Mahkamah Tinggi bahawa pemindahan hartanah tersebut dari KLH kepada perayu pertama adalah terbatal di bawah ss 47 dan/atau 52 Akta Kebankrapan 1967 ('Akta tersebut'). Hakim Mahkamah Tinggi yang arif mendapati bahawa perbuatan kebankrapan yang pertama yang dilakukan oleh KLH adalah pemindahan berdasarkan fraud atau pindahmilik hartanah tersebut kepada perayu pertama dan dengan itu memutuskan bahawa oleh kerana pindahmilik hartanah tersebut telah berlaku pada 26 Mac 1991, ia dalam lingkungan tempoh enam bulan sebelum tarikh pengemukaan petisyen kebankrapan tersebut. Isu terhadap perayu kedua adalah berkaitan dengan cagaran-cagaran tersebut. Responden tidak pernah mencabar semasa perbicaraan bahawa perayu kedua telah bertindak bona fide dalam memberikan pinjaman kepada perayu pertama. Responden telah berjaya memperolehi perintah perisytiharan dari Mahkamah Tinggi bahawa cagaran yang diwujudkan adalah terbatal terhadap responden dan bahawa disebabkan ss 47 dan 53B(2) Akta tersebut dan s 340(4) Kanun Tanah Negara 1965 ('KTN'), responden berhak mendapat balik hartanah tersebut dari perayu pertama bebas daripada cagaran perayu kedua. Hakim Mahkamah Tinggi memutuskan bahawa oleh kerana pemindahan di antara KLH dan perayu pertama adalah berdasarkan fraud dan dengan itu terbatal, hakmilik perayu pertama dalam hartanah tersebut telah diputuskan. Keputusan ini berhubung balik kepada masa pindahmilik dan oleh itu, perayu pertama tidak mempunyai apa-apa hakmilik pada mana-mana masa kepada hartanah tersebut dan justeru itu, beliau tidak mungkin boleh mewujudkan cagaran memihak kepada perayu kedua. Seterusnya, hakim Mahkamah Tinggi memutuskan bahawa perayu kedua tidak

A boleh menikmati perlindungan ketidakbolehsangkalan yang ditawarkan di bawah s 340(1) KTN. Ini merupakan rayuan-rayuan oleh perayu pertama dan kedua.

Diputuskan, menolak rayuan perayu pertama dan membenarkan rayuan perayu kedua:

B

(1) Dalam menghitung masa untuk tujuan berhubung balik di bawah s 47 Akta tersebut berkenaan dengan pindahmilik hartanah tersebut yang dikatakan berdasarkan fraud sebagai satu perbuatan kebankrapan, hakim Mahkamah Tinggi yang arif dengan betulnya telah mengambilkira tarikh daftar pindahmilik hartanah tersebut, C 26 Mac 1991, dan bukan tarikh pelaksanaan perjanjian jual beli pada 22 September 1990 yang dikatakan (lihat ms 122B–C); *Lian Keow Sdn Bhd (in liquidation) v Overseas Credit Finance (M) Sdn Bhd* [1988] 2 MLJ 449 diikut.

(2) Hakim Mahkamah Tinggi yang arif dengan betulnya D menimbangkan bahawa untuk membentuk pindahan berdasarkan fraud dalam konteks perundangan kebankrapan, tidak perlu wujudnya satu niat untuk menewaskan atau melambatkan pemiutang, umumnya melalui suatu perbuatan yang akan menghalang pengagihan hartanah yang tidak solven menurut undang-undang kebankrapan (lihat ms 122F–H); *Re Khor Bak* E *Kee* [1936] MLJ Rep 5 diikut.

(3) Setelah meneliti analisa keterangan oleh hakim Mahkamah Tinggi yang arif, keputusan beliau atas fakta dan penilaian keterangan saksi yang relevan, beliau betul dalam mendapati bahawa pindahmilik hartanah tersebut dari KLH kepada perayu pertama F merupakan pindahan berdasarkan fraud yang membentuk satu perbuatan kebankrapan dalam lingkungan s 3(1)(b) Akta tersebut dan dengan itu adalah terbatal. Oleh itu, ia bermakna bahawa disebabkan s 53B(1) Akta tersebut, hartanah tersebut dianggap sebagai hartanah responden (lihat ms 124D–E).

(4) Sehingga pendaftaran hartanah tersebut menurut s 349 KTN G dalam namanya, responden hanya diletakhak dengan kepentingan ekuiti dalam hartanah tersebut. Menurut prinsip-prinsip ekuiti, kepentingan undang-undang dalam cagaran yang diperolehi oleh perayu kedua, sebagai seorang pembeli bona fide untuk nilai dan tanpa notis, mengatasi kepentingan ekuiti responden (lihat H ms 126C–D).

(5) Setelah menerima bahawa perayu kedua telah bertindak secara suci hati dalam memberi pinjaman kepada perayu pertama, hakim Mahkamah Tinggi yang arif walau bagaimanapun gagal menimbang kesan s 53B(3) Akta tersebut. Walaupun pindahmilik hartanah tersebut boleh dielakkan atas alasan pindahan I berdasarkan fraud, perayu kedua berhak mendapat perlindungan s 53B Akta tersebut kerana ia telah bertindak dengan suci hati dan untuk balasan bernilai. Seksyen 53B(1) Akta tersebut

memperuntukkan bahawa sekiranya pemerolehan hartanah si bankrap diketepikan, hartanah tersebut harus dianggap hartanah pegawai pemegang harta dan pegawai pemegang harta boleh mendapat balik hartanah dari orang yang memperolehinya dari si bankrap atau dari mana-mana orang lain kepada siapa orang tersebut mungkin telah menjual, jual semula atau memindahmilik hartanah tersebut. Walau bagaimanapun, s 53B(3) Akta tersebut memperuntukkan pengecualian kepada s 53B(1) dan (2) sekiranya pembeli seterusnya memberi balasan bernilai dan bertindak dengan suci hati, yang mana satu-satunya jalan hanyalah terhadap orang yang memasuki transaksi dengan si bankrap, iaitu perayu pertama. Oleh itu, responden wajib mengambil hartanah tersebut tertakluk kepada cagaran perayu kedua (lihat ms 125D–F, 128D–G).

(6) Hakim Mahkamah tinggi yang arif terkhilaf dalam memakai s 340(4)(b) KTN sebagai memutuskan hakmilik KLH dari masa pindahan berdasarkan fraud, iaitu, 26 Mac 1991. Seksyen 340(4)(b) KTN merupakan satu peruntukan keselamatan dan tidak boleh beroperasi dengan sendirinya untuk memutuskan apa-apa hakmilik atau kepentingan dalam tanah. Dalam kes ini, keputusan kepentingan KLH dalam tanah boleh timbul sama ada menurut s 24(4) Akta tersebut pada masa penghakiman kebankrapannya atau pada elakkan pindahan berdasarkan fraud. Menurut s 349 KTN, letakhak kepentingan KLH dalam tanah tersebut dan letakhak kepentingan itu dalam responden, sama ada dalam mana-mana satu kejadian atas, hanya boleh dilaksanakan dengan pengindorsan suatu memorial pemindahan di bawah s 349(1). Tiada letakhak automatik sejauh mana tanah adalah berkenaan (lihat ms 127E–128A).]

Notes

For cases on determination of title or interests by operation of law, see 8 *Mallal's Digest* (4th Ed, 2001 Reissue) para 2500.

For cases on the doctrine of relation back, see 1 *Mallal's Digest* (4th Ed, 2001 Reissue) para 1994.

For cases on fraudulent conveyance, see 1 *Mallal's Digest* (4th Ed, 2001 Reissue) para 1990.

For cases on indefeasibility of interest, see 8 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 1905–1906.

For cases on vendor subsequently adjudged bankrupt, see 1 *Mallal's Digest* (4th Ed, 2001 Reissue) para 2894.

Cases referred to

Abirami Ammal & Anor v MSMM Meyappa Chettiar [1959] MLJ 149 (refd)

Khor Bak Kee, Re [1936] MLJ 5 (folld)

Krishnadas a/l Achutan Nair v Maniyam a/l Samy Kano [1997] 1 AMR 997 (refd)
Kwan Chew Shen t/a Syarikat Kaaf, Re [1987] 1 CLJ 314 (refd)
Lian Keow Sdn Bhd (in liquidation) v Overseas Credit Finance (M) Sdn Bhd [1988] 2 MLJ 449 (folld)
Lois Theresa Kao, Re; ex parte The Official Assignee [1965] 2 MLJ 223 (refd)
Mercantile Bank Ltd v The Official Assignee of the property of How Han Teh [1969] 2 MLJ 196 (refd)
Official Assignee of the estate of Koh Liang Hee (a bankrupt) v Koh Thong Chuan & Anor [1997] 5 MLJ 136 (refd)
Overseas Union Finance Ltd v Lim Joo Chong [1971] 2 MLJ 124 (refd)
PJTV Denson (M) Sdn Bhd & Ors v Roxy (M) Sdn Bhd [1980] 2 MLJ 136 (refd)
Re Yeow Heap Seng; ex parte The Official Assignee [1965] 2 MLJ 67 (refd)

Legislation referred to

Bankruptcy Act 1967 ss 2, 3(1)(b)(1)(i), 24(1), (4), 47(1), 52, 53B(1), (2), (3)
Courts of Judicature Act 1964 s 42
National Land Code 1965 ss 340(2), (3), (4), (4)(b)

Appeal from: Suit No S5–22–290 of 1995 (High Court, Kuala Lumpur)

Tommy Thomas (*Alan Gomez* with him) (*Tommy Thomas*) for the respondent.
Muker (*Lovelace & Hastings*) for the first appellant.
Darryl SC Goon (*Ng Sai Yeang* with him) (*Raja, Darryl & Loh*) for the second appellant.

Haidar JCA (delivering judgment of the court): The two appeals viz, No W–02–162–1997 and No W–02–169–1997 were heard together by us as they arose out of one action in the court below vide suit No S5–22–290–1995. I will refer the appellant in appeal No W–02–162–1997 as the first appellant and the appellant in appeal No W–02–169–1997 as the second appellant. The respondent is common to both appeals. The respondent acts for the estate of the bankrupt, ie Koh Liang Hee. It is to be noted that the first appellant is the son of the bankrupt.

After hearing the submissions of the parties, we reserved our decision. It is rather unfortunate that since then, one of the members of the panel, NH Chan JCA (as he then was) has retired. I will now proceed to give my decision.

The issue against the first appellant relates to the conveyance of a property of the bankrupt to him. The property is a piece of landed property held under Grant No 12474, Lot 94, s 43, District of Kuala Lumpur, on which is a bungalow house with a civic address of No 25, Jalan Yap Kwan

Seng, Kuala Lumpur ('the said property'). The conveyance was by way of a purported written sale and purchase agreement executed by them on 22 September 1990 for a consideration of RM1m. The respondent succeeded in obtaining a declaratory order of the court below that the conveyance of the said property from the bankrupt to his son, the first appellant, is void under ss 47 and/or s 52 of the Bankruptcy Act 1967 ('the Act'). There was a further declaratory order that the said property is vested by way of equity in the respondent. Other consequential were also made for which we are not concerned here.

The issue against the second appellant is in respect of the two charges created by the first appellant in favor of the second appellant in which the respondent succeeded in obtaining a declaratory order from the court below that the charges created are void against the respondent. There was a further declaratory order that by virtue of s 47 and 53B(2) of the Act and s 340(4) of the National Land Code 1965 ('the NLC') the respondent is entitled to recover the said property from the first appellant free from the second appellant's legal charges.

Put shortly, there are two causes of action. The first is the 'relation back' action under s 47 of the Act to be read with s 3 of the Act and this first cause of action is against both appellants. The second cause of action concerns only the first appellant under s 52 (wrongly referred to s 53B(2) of the Act) and as stated by the learned judge in his judgment, the second cause of action is more in the form of an alternative claim.

In his written submission before us counsel for the first appellant conceded:

(a) at all material times the first appellant was to a certain degree aware of the financial difficulties of his father, the bankrupt.

(b) the learned judge's finding that the conveyance was within the statutory period of six months set out in s 47 of the Act for the purpose of the doctrine of relation back subject to the conveyance being a fraudulent one.

The facts are sufficiently set out in detail by the learned judge and I will only set out the facts that are relevant in considering the issues before the court.

Section 3 of the Act prescribes the acts of bankruptcy. From the evidence, the learned judge concluded that the bankrupt committed acts of bankruptcy under s 3(1)(b) and 3(1)(i) of the Act. Section 3(1)(b) relates to a debtor making a fraudulent conveyance of his property and s 3(1)(i) relates to the failure of the debtor to comply with the bankruptcy notice issued to him within seven days after service of the notice to pay the judgment debt or sum ordered to be paid in accordance with the terms of the judgment or order.

As it seems that there are more than one acts of bankruptcy, I need only quote the learned judge's decision on this issue. This is what the learned judge stated in considering ss 24 and 47 of the Act when he held that the first act of bankruptcy when there is more than one, must be between 16 February 1991 and 3 July 1992 (at pp 144–145 of *Official Assignee of the*

estate of Koh Liang Hee (a bankrupt) v Koh Thong Chuan & Anor [1997] 5 MLJ 136):

> In order to consider the cause of action for relation back of the bankruptcy, pertinent sections of the Act needs to be considered. The first is s 24(1) of the Act which provides that a person is adjudicated a bankrupt at the time when a receiving order is made against him. Upon this 'his property shall become divisible among his creditors and shall vest in the Official Assignee' under s 24(4) of the Act. However by virtue of s 47(1) of the Act a relation back of the bankruptcy can occur for it provides:
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> > 'The bankruptcy of a debtor, whether the same takes place on the debtor's own petition or upon that of a creditor, shall be deemed to have relation back to and commence at the time of the act of bankruptcy being committed on which a receiving order is made against him, or if the bankrupt is proved to have committed more acts of bankruptcy than one to have relation back to and to commence at the time of the first of the acts of bankruptcy proved to have been committed by the bankrupt within six months next preceding the date of the presentation of the bankruptcy petition.'
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> In brief, the first situation is where the bankruptcy relates back to the time when the act of bankruptcy was being committed on which a receiving order is made against him. However, and more relevant to our case is where there had been more than one act of bankruptcy committed, then the relation back is to the first of the acts of bankruptcy committed by the bankrupt within six months after the presentation of the bankruptcy petition.
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> What then are the acts of bankruptcy committed in this case? Initially the act of bankruptcy on which the bankruptcy petition was founded was the failure of the father to satisfy the judgment sum obtained against him by UMBC stated in the bankruptcy notice served on him on 29 May 1991. This act of bankruptcy falls within s 3(1)(i) of the Act. The other act of bankruptcy which happened earlier and as claimed by the plaintiff is the transfer of the property to the first defendant which the plaintiff alleged was a fraudulent conveyance within s 3(1)(i)(b) of the Act.
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> Section 3(1)(i)(b) of the Act provides:
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> 'A debtor commits an Act of bankruptcy in each of the following cases:
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> (b) if in Malaysia or elsewhere he makes a fraudulent conveyance, gift, delivery or transfer of his property or of any part thereof;'
>
> ...
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> As time is of essence here, it is best to determine the exact period for consideration. The bankruptcy petition was presented on 15 August 1991 against the father. Six months preceding this date would land us with 16 February 1991. This means that the first act of bankruptcy, if there is more than one, must have been committed between 16 February 1991 and 3 July 1992 (the date the father was adjudicated a bankrupt).

It is not disputed that pursuant to the purported sale and purchase agreement executed on 22 September 1990 between the bankrupt and his son, the first appellant, in respect of the said property and up to the registration of the said property in the name of the first appellant on 26 March 1991, the bankrupt was not yet adjudicated a bankrupt though a judgment was entered against him by United Malayan Banking

Corporation vide Civil Suit No D2–23–1034–88 in the sum of RM5,130,596.45 earlier on 15 December 1989. It was the United Malayan Banking Corporation who took up the bankruptcy proceedings against the bankrupt and obtained receiving and adjudication orders against him on 3 July 1992.

In computing the time for the purpose of relation back under s 47 of the Act in respect of the alleged fraudulent transfer of the said property as an act of bankruptcy, the learned judge, in my view, correctly took the date of the registration of the said property, that is, 26 March 1991 citing *Lian Keow Sdn Bhd (in liquidation) & Anor v Overseas Credit Finance (M) Sdn Bhd & Ors* [1988] 2 MLJ 449 rather than the date of the execution of the alleged sale and purchase agreement, that is, 22 September 1990. He therefore correctly concluded thus (at p 147 of [1997] 5 MLJ 136*)*:

> The transfer of the property to the first defendant took place on 26 March 1991, and by elementary arithmetic this is well within the period of six months preceding the date of presentation of the bankruptcy petition against the father which was on 15 August 1991. Therefore the alleged fraudulent conveyance can still be considered for relation back under s 47 of the Act.

The first appellant's appeal

The central issue for consideration would then be the interpretation of the word 'fraudulent' in s 3(1)(b) of the Act. The word 'property' referred to in s 3(1)(b) of the Act must by the interpretation of the word 'property' in s 2 of the Act, inter alia, includes land. The issue is whether there was a fraudulent conveyance of the said property from the bankrupt to his son, the first appellant.

The learned judge, in my view, correctly addressed his mind on what tantamount to fraudulent in the context of bankruptcy legislation. He referred to p 514 of 4 *Halsbury's Laws of England* (4th Ed) (at p 145 of [1997] 5 MLJ 136*)*:

> The word 'fraudulent' has received ... with reference to the bankruptcy questions, a particular signification different from that in which it is ordinarily used (per Knight-Bruce VC in *Re Marshall, ex parte Zwilchenbart* (1844) 3 Mont D & De G 671.) There need not be more than a design to defeat or delay creditors, generally by some act which will prevent the distribution of the insolvent debtor's property in accordance with the bankruptcy law (*Re Sinclair, ex parte Chaplin* (1884) 26 Ch D 319, 53 LJ Ch 732).

The learned judge proceeded to consider, what I would say, the factors for consideration in conveyances by bankrupts by reference to a local Court of Appeal case. It is *Re Khor Bak Kee* [1936] MLJ 5. This is what Thomas CJ (FMS) said at p 6:

> In conveyances by bankrupts it is always necessary to consider the state of affairs at the time of the conveyance, the relationship of the respective parties, the sufficiency of the consideration, and in short all the surrounding circumstances.

A Further on at p 7, Thomas CJ (FMS) said:

> A conveyance which would not be fraudulent when the parties are solvent can be fraudulent in a bankruptcy, because the interests of other creditors have not been observed.

B Having focused his mind on the meaning of 'fraudulent' in the context of bankruptcy legislation, the learned judge proceeded to analyze the facts, that is, whether there was sufficient evidence before him to conclude that there was a fraudulent conveyance in this case. He considered them broadly, in my view, under three categories. They are:

C (1) the relationship of parties;

(2) the consideration in the purported sale and purchase agreement;

(3) the intention of the parties in the conveyance.

(1) Relationship of the parties (at p 148 of [1997] 5 MLJ 136)

D It is not disputed that the transfer of the said property is from the father (the bankrupt) to his son, the first appellant. Such being their relationship suspicion is inevitably arose as to whether the transaction is bona fide so as to defeat or delay the creditors. I must, however, say that mere suspicion is insufficient to show fraudulent. There must be facts to support a strong E inference that it is a fraudulent conveyance within the meaning of s 3(1)(b) of the Act.

Bearing in mind the age of the first appellant, that is, 25 years old at that time and drawing a salary of RM3,000 per month, the first appellant could still purchase another property referred to as the Sentul property with a declared value of RM600,000 within 1½ months of the purchase of the said F property for RM1m no doubt with the financial assistance of the banks, the learned judge concluded (at p 148 of [1997] 5 MLJ 136]):

> What strikes me is the close proximity of these transactions between each other as well as to the time when the family was facing severe financial hardship, the magnitude of the loans, and the almost similar proprietors.

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(2) The consideration in the purported sale and purchase agreement (at pp 148–149 of [1997] 5 MLJ 136).

The learned judge had given detailed analysis on the consideration for the said property. He concluded, thus (at p 149 of [1997] 5 MLJ 136):

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> To my mind, the theory of 'to help my father' is completely an eyewash; it is more like helping oneself or to help the father to defeat creditors.

(3) The intention of the parties in the conveyance (at pp 149–150 of [1997] 5 MLJ 136).

I

The learned judge went to examine in detail on this issue as it seemed the first appellant as the transferee denied that he was possessed of knowledge

that his father, the bankrupt, was in dire financial situation at the material time hoping to imply that the transfer was bona fide. However, before us, counsel for the first appellant conceded that to a certain degree he was aware of the financial difficulties of his father, the bankrupt.

The learned judge concluded, thus (at p 150 of [1997] 5 MLJ 136):

> Judging the conditions which the father and his family were in at the time, I find it probable that the father transferred the property to the first defendant to ensure its safety from an impending financial disaster. The most appropriate person to safeguard it was the first defendant since he was the only male linage who escaped the clutches of UMBC by not being a guarantor.

At the time of the hearing of this case before the court below, the bankrupt was dead and the learned judge was deprived of his testimony. Be that as it may, there were witnesses including the first appellant called to testify in this case in the court below.

I have carefully examined the learned judge's analysis of the evidence and his finding of the facts and his assessment of the testimony of the relevant witnesses, I cannot possibly disagree with him.

In the circumstances, I agree with the learned judge when he found that the transfer of the said property from the father, the bankrupt, to the first appellant was a fraudulent conveyance constituting an act of bankruptcy within s 3(1)(b) of the Act and it is therefore void.

As the court below held that the transaction between the bankrupt and the appellant is void, it follows that by virtue of s 53B(1) of the Act, the said property shall be deemed to be the property of the official assignee, the respondent.

Counsel for the first appellant further contended that even if the sale of the said property from the bankrupt to his son, the first appellant, is void (which is denied), does the respondent take the same without the burden of the Development and Commercial Bank's charge? He submitted that the Development and Commercial Bank was a secured creditor at the time of the execution of the alleged sale and purchase agreement and if the sale had not gone through the respondent would have to pay off the Development and Commercial Bank, the secured creditor. In the circumstances, the first appellant contended that he should be reimbursed for the sum paid to discharge the charge. With respect, on the facts of this case, the argument of the first appellant is untenable. I therefore reject it. The Singapore cases of *Re Yeow Heap Seng; ex parte The Official Assignee* [1965] 2 MLJ 67 and *Re Lois Theresa Kao; ex parte The Official Assignee* [1965] 2 MLJ 223 cited, are of no assistance to the facts of this case.

In view of the decision of the learned judge on the first cause of action, I do not see the need of his Lordship to consider the second cause of action, which he himself said is more in the form of an alternative claim. I therefore do not find it necessary to consider it in view of his affirmative decision on the first cause of action.

The second appellant's appeal

On 1 September 1993, the second appellant offered financial facilities to the first appellant which were accepted. The facilities were to be secured by way of two separate charges on the said property. The said property was at that time charged to Standard Chartered Bank.

The second appellant did all they could by conducting a search on the said property and a bankruptcy search on the first appellant. The searches confirmed that the said property was registered in the first appellant's name and that he was not a bankrupt. Save for the need to discharge the Standard Chartered Bank's charge which was disclosed, it would appear that there was no legal impediment or risks in respect of the said property for the second appellant to provide the loans to the first appellant. The learned judge himself said that the respondent never challenged during the trial that the second appellant acted bona fide in the loans granted to the first appellant over which the present two legal charges were registered against the said property.

Having accepted that the second appellant acted in good faith for the consideration of the loans to the first appellant, the learned judge, however, failed to consider the effect of s 53B(3) which has reference to s 53B(1) and (2) of the Act. Section 53B(3) reads:

> Notwithstanding sub-s (1) and (2), where any person, (not being the person who acquired the property from the bankrupt) to whom the property was sold, resold or otherwise disposed of, had paid or given therefor valuable consideration and acted in good faith such person shall not be subject to the operation of this section and the official assignee's recourse for recovery of the consideration so paid or given or its value shall be solely against the person who entered into the transaction with the bankrupt.

The transfer of the said property to the first appellant may be avoided by the court on ground of fraudulent conveyance in which the court below so held and I agree (see *PJTV Denson (M) Sdn Bhd & Ors v Roxy (M) Sdn Bhd* [1980] 2 MLJ 136. However, in respect of the second appellant, they are entitled to the protection of s 53B of the Act as it is not disputed that they acted in good faith and for valuable consideration (see s 53B(3)).

The question for consideration is what then is the effect on any registered interest should such an avoidance takes place? In this case, it is the registered legal charges in favor of the second appellant. Should the official assignee, the respondent, takes the said property subject to the registered legal charges as is the contention of counsel for the second appellant?

As the said property involves land, it will only be vested in the respondent by way of registration as we practise the Torrens system in this country. Part Twenty-Two of the NLC provides for transmission on death and bankruptcy. The relevant section in this case is s 349 and reads:

> Registration of official assignee
>
> (1) Where the official assignee claims any land, or share or interest in land, under any written law for the time being in force relating to bankruptcy,

he may apply to the registrar under this section for the registration thereof in his name, and the registrar shall give effect to the application by endorsing a memorial of the transmission on the register document of title to the land in question or, as the case may be, the land in which the share or interest in question subsists.

(2) Every such memorial shall be signed and sealed by the registrar, and a copy thereof shall, if he is able to secure its production, be made by him on the issue document of title to the said land or, where the memorial relates to a lease or charge, on the duplicate thereof.

(3) No land, share or interest shall vest in the official assignee under any adjudication of bankruptcy, or order for administration in bankruptcy, until it has become registered in his name pursuant to this section.

It is not disputed that the said property has not been registered under the name of the respondent. It is equally not disputed (and accepted by the learned judge) that the second appellant was a bona fide purchaser for value and without notice. It follows, in my view, that the respondent until registration of the said property pursuant to s 349 of the NLC in his name, is vested only with an equitable interest in the said property. In accordance with equitable principles, the legal interest in the charges acquired by the second appellant, as a bona fide purchaser for value and without notice, would overreach the respondent's equitable interest (see *Mercantile Bank Ltd v The Official Assignee of the property of How Han Teh* [1969] 2 MLJ 196).

Quite apart from the legal interest versus the equitable interest issue the first appellant's interest may be defeated due to his being privy to the fraud but the second appellant's interest, as the registered chargee, are indefeasible as the second appellant was a bona fide purchaser for value and without notice (see s 340(2) and (3) of the NLC). The learned judge himself accepted the vestment of the said property in the respondent in equity by relying on *Re Kwan Chew Shen T/A Syarikat Kaaf* [1987] 1 CLJ 314 where VC George J (as he then was) said:

> Having the Torrens system in particular s 349 NLC in mind, it is obvious s 24(4) of the Bankruptcy Act should be read subject to the requirement of s 349, as far as land and interest in land is concerned. This is not to make for s 24(4) to be pointless. Section 24(4) of the Bankruptcy Act and s 349 of the NLC should be read as complementing each other. Section 24(4) in the context of the Torrens system has the effect that upon the adjudication of bankruptcy, land and interest in land belonging to the bankrupt vest in equity (and not in law) in the official assignee. It will only vest in the official assignee at law when the requirement of the law of registration as provided by s 349 have been met.

The learned judge accepted what is stated above as a sound ruling and correct position of the law. I have no quarrel with that. The learned judge then proceeded to consider the issue of indefeasibility of registered title and interests under s 340(1) of the NLC. The learned judge after discussing the relevant sub-s of s 340 of the NLC in particular s 340(4)(b) and the judgment in *Krishnadas a/l Achutan Nair & Ors v Maniyam a/l Samykano* [1997] 1 MLJ 94 at p 100, concluded (at pp 153–154 of [1997] 5 MLJ 136):

A When this court ruled that the conveyance between the father and the first defendant was fraudulent and therefore void, the title of the first defendant in the said property determined. When it determined, the concept of indefeasibility no longer applies by virtue of s 340(4) NLC, and since it determined by reason of the transfer being void, it relates back to the time of the transfer. This means that the first defendant had no title at any time to the B said property. When he had no title to the said property he could not have created the legal charges in favor of the second defendant since the legal charges subsist on the strength of the first defendant's claim to the title. They too have no protection of indefeasibility offered under s 340(1) of the NLC.

C The purpose of s 340(4)(b) of the NLC was considered by the Federal Court in *Krishnadas a/l Achutan Nair & Ors v Maniyam a/l Samykano* referred to by the learned judge. This is what Gopal Sri Ram JCA speaking for the Federal Court stated at p 100:

D In our judgment, Parliament enacted s 340(4)(b) for the purpose of dealing with fact patterns that do not fall squarely within the other exceptions to indefeasibility that appear in the second subsection to s 340 of the Code (National Land Code 1965). While recognizing that it is neither possible, nor desirable to predict with any degree of certainty the wide range of cases that, while failing to come within the vitiating categories specified by the second subsection, may yet come within the scope of s 340(4)(b), we cite, by way of illustration only, cases decided under the Moneylenders Act 1951.

E The Federal Court went on to cite *Abirami Ammal & Anor v MSMM Meyappa Chettiar* [1959] MLJ 149 and *Overseas Union Finance Ltd v Lim Joo Chong* [1971] 2 MLJ 124 by way of illustration.

With respect, I agree with the contention of counsel for the second appellant that the learned judge erred in applying s 340(4)(b) of the NLC F as having determined the bankrupt's title from the time of the alleged fraudulent conveyance, that is, 26 March 1991. Section 340(4)(b) is a savings provision and cannot operate by itself to determine any title or interests in land. It is the operation of s 340(4)(b) which permits the determination of title or interest in land by operation of law as in this case, the Bankruptcy Act. It would appear that without s 340(4) of the NLC no G registered title or interests are defeasible save for the instances set out in s 340(2) of the NLC.

In the case of bankruptcy and the operation of the Act, the determination of a bankrupt's interest in land can arise either:

(a) pursuant to s 24(4) of the Act (the automatic vesting of the property) H at the time of the adjudication of his bankruptcy, or

(b) upon the avoidance of a fraudulent conveyance.

However, taking into consideration the purport of s 349 of the NLC, the divesting of the bankrupt's interest in the land and the vesting of that interest in the official assignee, the respondent, in either of the above events, I may only be effected by the endorsement of a memorial of transmission under s 349(1) thereof. It is further provided by s 349(3) that no land, share or interest shall vest in the official assignee under any adjudication of

bankruptcy until it has become registered in his name pursuant to this section. In other words, it is not an automatic vesting in so far as land is concerned.

It seems clear that s 340(4) only preserves the application of the Act in determining title and interests in land in bankruptcy whilst s 349 of the NLC effectuates the vesting of title and interests in the official assignee thereby divesting the title and interests of the bankrupt in the land. Therefore until the official assignee effectuates his rights under the NLC no title to the land vests in the official assignee.

In this case, there was a finding of fraudulent transfer of the said property and it was avoided by the court below but the title to the said property is yet to be vested in the respondent pursuant to s 349 of the NLC as no action had been taken by the respondent to that effect. In that event until registration of the title of the said property in the respondent's name on behalf of the bankrupt, the respondent has only an equitable interest in the said property.

The Act itself by way of s 53B(1) provides that in the event the acquisition of the property of the bankrupt is set aside, as in this case, the property shall be deemed to be the property of the official assignee and the official assignee may recover the property from the person who acquired it from the bankrupt or from any other person to whom the person may have sold, resold or transferred the property as fully and effectually as the official assignee could have recovered the property if it had not been so sold, transferred, or disposed of. However, s 53(B)(3) of the Act provides exception to sub-ss (1) and (2) of s 53(B) if the subsequent acquirers give valuable consideration and acted in good faith in which case the recourse would be only as against the person who entered into the transaction with the bankrupt as in this case, the first appellant.

The second appellant acted in good faith and for valuable consideration in granting the loans to the first appellant and in executing the charges that were duly registered. This is not disputed. The respondent lodged a registrar's caveat very much later, sometime in 1994 and is therefore of no help.

In the circumstances, I am of the view that the respondent would have to take the said property subject to the second appellant's charges and I so rule accordingly.

Orders

For the reasons stated, I would make the following orders.

In respect of the first appellant, the appeal is dismissed with costs. The deposit is to go towards taxed costs.

In respect of the second appellant, the appeal is allowed with costs. The order of the learned judge is set aside. The deposit is to be refunded.

My learned brother, Gopal Sri Ram JCA, has seen this judgment and agreed with it.

A This judgment is given pursuant to s 42 of the Courts of Judicature Act 1964.

First appellant's appeal dismissed and second appellant's appeal allowed.

Reported by Lim Lee Na

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